Supreme Court, U.S.
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No. 99-1739

In The

Supreme Court of the United States

DALLAS-FORT WORTH
INTERNATIONAL AIRPORT BOARD,

Cross-Petitioner,

v.

THE UNITED STATES
DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE OF SOUTHWEST AIRLINES CO. TO CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit's decision upholding the Department of Transportation's interpretation that the Wright Amendment commuter airlines exception allows single-ticket service from Love Field to points beyond the Love Field Service Area, *if* a first leg is flown intrastate on a 56-seat aircraft that then connects at a Texas airport for a second-leg, long-haul flight to virtually any city in the world, conflicts with the opinion of this Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), on the construction of federal statutes and with the decision of the D.C. Circuit in *Continental Air Lines, Inc. v. Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988), that Love Field should be maintained as a "short-haul" airport?

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RULE 29.6 STATEMENT

Respondent Southwest Airlines Co. is a corporation whose stock is publicly traded. It has no parent company and no publicly traded company owns 10% or more of its outstanding stock.

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RESPONSE OF SOUTHWEST AIRLINES CO. TO CROSS-PETITION FOR A WRIT OF CERTIORARI

Respondent Southwest Airlines Co. ("Southwest") respectfully makes this Response to the Cross-Petition for a Writ of Certiorari filed by the Dallas-Fort Worth International Airport Board (the "DFW Airport Board"). Southwest files its Response pursuant to Rule 12.6 of this Court to support the request of Cross-Petitioner for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit on the second question presented in the Cross-Petition.

OPINIONS BELOW

The opinion of the court of appeals is reported at 202 F.3d 788, and is reproduced at Appendix A to the Petition for a Writ of Certiorari previously filed by the City of Fort Worth in the related Cause No. 99-1462. (FW Pet.App. 1-52). The Department of Transportation's Declaratory Order is publicly available at 1998 WL 911847 (D.O.T.). That Order, and the DOT's Order on Procedural Motions, are reproduced at Appendices B (FW Pet.App. 53) and C (FW Pet.App. 147), respectively, to Fort Worth's Petition for a Writ of Certiorari.

JURISDICTION

The court of appeals entered its judgment on February 1, 2000, and issued a revised opinion on February 24, 2000 (FW Pet.App. 1). No petition for rehearing has been

filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions are Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35, 48 (1980) [the Wright Amendment]; and Sections 337(a) and (b) of the Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997) [the Shelby Amendment]. They are set forth in the appendix at 1a.

STATEMENT OF THE CASE

This proceeding is the latest manifestation of a dispute over the proper roles of airports in the Dallas-Fort Worth metropolitan area that has taken place over the course of nearly three decades, in numerous forums – federal and state courts, the Texas Aeronautics Commission, the Texas legislature, the Congress, the Civil Aeronautics Board and the U.S. Department of Transportation. The present case arises out of Department of Transportation Declaratory Order 98-12-27, which contained rulings on five issues of federal law affecting the operation of Love Field, a municipal airport in Dallas, Texas. The Department of Transportation ("DOT") chose to initiate the proceeding that resulted in the Declaratory Order to resolve disputes among various parties in the Dallas-Fort

Worth aviation market occasioned by the passage by Congress of the "Shelby Amendment" in October of 1997.[1] The particular statutory provisions at issue here have their roots in events which began over 30 years ago, largely as the result of the effort of Southwest Airlines to fly out of Love Field; and the issues in this case can be understood only if placed in that historical context. The following discussion summarizes the history of the underlying dispute that has culminated in the case now before this Court.

I. HISTORY OF LOVE FIELD LITIGATION

In 1968, after years of sparring over which local airport should be designated to serve the needs of the Dallas-Fort Worth region, the Cities of Dallas and Fort Worth agreed to construct a *new* Dallas-Fort Worth Regional Airport ("DFW") midway between the two cities. For that purpose the cities adopted a Regional Airport Concurrent Bond Ordinance (the "Concurrent Bond Ordinance"), Section 9.5A of which provided that the Cities:

> . . . shall take such steps as may be necessary, appropriate and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective *phase-out at Love Field*, Redbird, GSIA and Meacham Field, *of any and all Certificated Air Carrier Services*, and to transfer such activity to the Regional Airport effective upon the beginning of operations at the Regional Airport.

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[1] The Shelby Amendment, Public Law 105-66, § 337 is discussed at p. 8, *infra*.

City of Dallas v. Southwest Airlines Co., 371 F.Supp. 1015, 1020 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir. 1974) (emphasis added). In 1970, the principal airlines then serving the Dallas-Fort Worth area signed agreements to serve DFW Airport, and in 1974 moved all their flights from Love Field and other local airports to the newly-opened DFW Airport. 371 F.Supp at 1020-21. This massive facility is located in Grapevine, Texas, some 22 miles from downtown Dallas, nearly four times farther than close-in Love Field.

On June 18, 1971, after three and a half years of hearings, litigation, and appeals occasioned by competing air carriers,[2] Southwest Airlines began service as an intrastate airline certificated by the Texas Aeronautics Commission, serving routes from Dallas Love Field to Houston, and San Antonio, Texas. In October 1971, Southwest advised the DFW Airport Board that it did not intend to serve DFW, and in March 1972, Southwest formally petitioned the DFW Airport Board for an exemption from or waiver of Section 9.5 of the Concurrent Bond Ordinance to allow Southwest to continue to serve Love Field. The response from Dallas, Fort Worth and the DFW Airport Board was a lawsuit, seeking a declaratory judgment declaring their right under federal and state law to exclude Southwest from Love Field. Southwest counterclaimed, seeking a declaration of its right under federal and state law to remain at Love Field. The Texas Aeronautics Commission, the state agency that authorized

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[2] *See, e.g., Texas International Airlines, Inc. v. Civil Aeronautics Board*, 473 F.2d 1150 (D.C. Cir. 1972); *Texas Aeronautics Commission v. Braniff Airways, Inc.*, 454 S.W.2d 199 (Tex.), *cert. denied*, 400 U.S. 943 (1970).

Southwest's certificate to provide intrastate service, intervened in support of Southwest.

In an exhaustive opinion, the district court resoundingly rejected the position of the cities and the DFW Airport Board that they could exclude Southwest from Love Field. Relying on both federal and state law grounds, the court ruled that Southwest's Love Field service could not be barred by Section 9.5 of the Concurrent Bond Ordinance and that "the exclusion of Southwest Airlines from Love Field would not be legally permissible." The Fifth Circuit affirmed this decision and this Court denied certiorari. *City of Dallas v. Southwest Airlines Co.*, 494 F.2d 773, 777 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974).[3]

As a consequence of the federal court decisions, Southwest operated out of Love Field, as an intrastate carrier, during most of the 1970's. In 1978, however, Congress passed the Airline Deregulation Act, Pub. Law 95-504 (1978), dramatically liberalizing the route entry and pricing freedom of commercial air carriers. Deregulation created the opportunity for Southwest Airlines to become an interstate air carrier. In late 1978, Southwest launched its first interstate service, between Houston and New Orleans. In January 1979, Southwest filed an application with the U.S. Civil Aeronautics Board ("CAB") for authority to fly between Dallas (Love Field) and New

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[3] This defeat did not deter the Cities of Dallas and Fort Worth, the DFW Airport Board, or the DFW air carriers from other efforts to expel Southwest from Love Field. Each attempt, however, was rebuffed by the federal courts. *See, e.g., Southwest Airlines Co. v. Texas International Airlines, Inc.*, 396 F.Supp. 678 (N.D. Tex. 1975), *aff'd*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977).

Orleans under the Automatic Market Entry ("AME") provisions of the Airline Deregulation Act. Fort Worth, Dallas, the DFW Airport Board, American Airlines, Congressman Jim Wright (then House Majority Leader and representative from Fort Worth), and others acting in concert with them filed objections to Southwest's application with the CAB. However, the CAB awarded Southwest permanent authority in the Dallas (Love Field) – New Orleans market in 1979. Order 79-6-187, CAB Dockets 33777, *et al.* (June 28, 1979).

II. PASSAGE OF THE WRIGHT AMENDMENT

Their failure before the Civil Aeronautics Board prompted the Dallas/Fort Worth parties to turn to Congress, in an effort to change the law and to restrict service at Love Field. Majority Leader Wright offered an amendment to an unrelated aviation bill under consideration by the House, which would have *prohibited*, as a matter of federal law, *all commercial interstate air service* at Love Field. The Senate failed to agree to this amendment, however, and the matter was referred to a conference committee.[4] After lengthy negotiations, a legislative compromise was struck. This legislation, known as the Wright Amendment (Section 29 of the International Air Transportation Competition Act of 1979, Public Law 96-192), was described by the Conference Committee as "a fair and equitable settlement for a dispute that has raged in the

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[4] *See* discussion in the Department of Transportation's *Love Field Amendment Proceeding*, Order 85-12-81 at 3 (December 31, 1985) (DFW Airport Board Pet.App. 11), *aff'd Continental Air Lines v. Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988).

Dallas/Fort Worth area for many years." Senate Conference Report No. 96-531, 96th Cong. 1st Session, at 24.

Subsection (a) of the Wright Amendment prohibited (except as provided in subsection (c) of the Amendment) the federal government from authorizing any interstate service at Love Field, except for a small quota of charter flights and an allowance for commuter air carriers operating aircraft with no more than 56 seats. Subsection (b) allowed Southwest to continue its existing interstate (New Orleans) service at Love Field, but prohibited airlines from offering other interstate services at Love Field except as specifically authorized by the Wright Amendment.

Subsection (c) carved out a limited exception to the ban on interstate service from Love Field involving planes with more than 56 seats. It allowed air carriers to provide such service between Love Field and points in the four states contiguous to Texas (Louisiana, Arkansas, Oklahoma, and New Mexico). However, even this limited exception was made subject to two additional restrictions, to ensure that airlines could not evade the law's intent to maintain Love Field as a "short-haul" airport. Under the Wright Amendment, subsection (c), an air carrier can offer the interstate service within the designated five state area provided: (1) the air carrier does not offer through service or ticketing with another air carrier; and (2) the air carrier "does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside [the five-state service area]."[5]

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[5] The Department defined "through service and ticketing" in the *Love Field Amendment Proceeding, supra* as "the provision of transportation between an ultimate origin and destination on

III. PASSAGE OF THE SHELBY AMENDMENT

For almost 18 years the Wright Amendment governed the permissible geographic boundaries for air service from Love Field: Texas and the contiguous states of Louisiana, Arkansas, Oklahoma, and New Mexico. The constitutionality of the Wright Amendment was upheld by courts of appeals as a legitimate exercise of the plenary power of Congress to regulate interstate commerce. *Kansas v. United States*, 16 F.3d 436 (D.C. Cir.), *cert. denied*, 513 U.S. 945 (1994); *Cramer v. Skinner*, 931 F.2d 1020 (5th Cir.), *cert. denied*, 502 U.S. 907 (1991).

As an act of Congress, however, the Wright Amendment was subject to modification by that body. In 1997, Senator Richard Shelby of Alabama, Chairman of the Senate Appropriations Committee, added an amendment to an otherwise unrelated aviation appropriations bill (the "Shelby Amendment"), which expanded the permissible geographic scope of service from Love Field to include three additional states: Kansas, Alabama, and Mississippi. The Shelby Amendment also modified the Wright Amendment to define the term "passenger capacity of 56 passengers or less" to include large aircraft (300,000 pounds or less gross weight), reconfigured to accommodate 56 or fewer passengers. Public Law 105-66, § 337 (1997). The Shelby Amendment became law on October 27, 1997.

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a single ticket for a single sum . . . The service may be offered on a single flight with one or more stops, or it may be offered on connections between two flights." The key concept is that it is "sold by the carrier, and perceived by the passenger, as a single trip on a single ticket for a single sum fare, thus constituting a single contract." DFW Airport Board Pet. App. 14 (Order 85-12-81).

IV. FORT WORTH'S LAWSUIT

Promptly after Congress passed the Shelby Amendment (but before the President signed it), the City of Fort Worth filed suit in the 48th Judicial District Court of Tarrant County, Texas against the City of Dallas and certain air carriers that were viewed as potential users of Love Field, though not against Southwest.[6] The City of Fort Worth sought a declaratory judgment that the City of Dallas was contractually obligated to Fort Worth to prevent any air carrier from taking advantage of the Shelby Amendment.

On October 15, 1998, the state district court granted summary judgment for Fort Worth and its litigation allies, American Airlines and the DFW Airport Board against Dallas, Continental Express, Inc. and Legend Airlines, Inc. In a brief order that did not include a supporting opinion, the court ruled that Dallas was obligated by the 1968 Concurrent Bond Ordinance to bar airlines at Love Field from operating additional services authorized by the Shelby Amendment and that federal law did not override the cities' agreement to restrict Love Field service. *See* FW Pet.App. 178.

V. THE DOT PROCEEDING BELOW

In August 1998, while the Tarrant County litigation was still underway, the DOT instituted the *Love Field Service Interpretation Proceeding*, in order to "issue a ruling on the major federal law issues raised by the dispute" in

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[6] Interference by suit with Southwest's use of or access to Love Field had been prohibited by an earlier federal court injunction against, among others, the City of Fort Worth. *See* note 3, *supra*.

the state court proceeding. DOT Order 98-8-29 at 1, August 25, 1998. The Department's order explained that several of the parties in the Texas litigation had asked the Department to take steps to resolve the dispute; that certain members of Congress had urged the Department to take action to assert the federal interests involved in the dispute; and, that, as the agency primarily responsible for administering the relevant federal statutes, the Department believed it had a responsibility to rule on the federal issues underlying the Texas litigation, much as the Department had done in 1985 in the *Love Field Amendment Proceeding, supra,* n.4. The Department therefore requested comments from interested parties on five issues of federal law. FW Pet.App. 53, 80-81. DOT Orders 98-8-29 and 98-9-5 (September 3, 1998).

Following voluminous comments to the DOT, by the parties who are now before this Court, as well as by other interested parties, the Department ruled on the five issues as follows:

> (1) The City of Dallas' proprietary powers as owner of Love Field do not allow it to bar air carriers from operating services authorized by the Shelby Amendment, and thus Fort Worth may not enforce contractual claims against Dallas that would force it to do otherwise.
>
> (2) Under the federal aviation preemption provision, the Wright and Shelby Amendments preempt any agreement between Dallas and Fort Worth to restrict air service at Love Field that is permitted by those Amendments.
>
> (3) The Shelby Amendment allows an airline to operate long-haul service from Love Field with any aircraft having no more than 56 seats, including regional jets.

(4) The DFW use agreements may not be enforced to block a DFW signatory airline from offering interstate service at Love Field that is permitted by the Wright and Shelby Amendments.

(5) The Wright Amendment permits Continental Airlines and its subsidiary Continental Express to offer through service and ticketing from Love Field to points outside Love Field service area via Houston, so long as their flights from Love Field to Houston use aircraft with 56 seats or less.

See Order 98-12-27 (FW Pet.App. 53, 145-46).

Following petitions for reconsideration by the City of Fort Worth and the DFW Airport Board, the DOT issued an Order on Reconsideration that generally affirmed its prior rulings in Order 98-12-27.[7] Issue Five, whether Continental Airlines' through service and ticketing from Love Field to points outside the Love Field service area via Houston is lawful, which is the subject of this Response, was not substantively discussed in the DOT's Order on Reconsideration.

VI. THE FIFTH CIRCUIT DECISION

Various of the parties to the DOT proceeding petitioned the United States Court of Appeals for the Fifth Circuit challenging some or all of the decisions on the five issues. Southwest strongly supported the Department's rulings on Issue One, regarding the limited scope of Dallas' proprietary rights, and Issue Two, regarding

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[7] The Order on Reconsideration is publicly available at 1999 WL 218767 (D.O.T.). It is also reprinted in the Appendix to the Petition for a Writ of Certiorari filed in this matter by American Airlines, Inc. at 128a.

the preemptive effect of the Wright and Shelby Amendments over state and local government regulation. The Department's rulings on those issues were, in fact, in full accord with Southwest's comments to the Department in the *Love Field Service Interpretation Proceeding*.

However, Southwest believed that the DOT erred in ruling on Issue Five that Continental Express and Continental Airlines may lawfully offer through service and ticketing between Love Field and points beyond the eight-state Love Field service area via Houston, so long as their flights between Love Field and Houston are conducted with aircraft having no more than 56 seats. Accordingly, Southwest filed a petition for review of Order 98-12-27 in order to challenge the Department's ruling on Issue Five.[8] In its decision, the court of appeals denied relief to all petitioners, affirming the DOT's orders on all five points. *American Airlines, Inc. v. Department of Transportation*, 202 F.3d 788 (5th Cir. 2000) (FW Pet.App. 1).

On the through service issue, the court of appeals obviously acted with reluctance, noting that the statutory interpretations necessary to support of the DOT's position on this issue "strain the meaning of [the statute's] terms." 202 F.3d at 813 (FW Pet. App. 51). Southwest believes that the statutory interpretation made in connection with Issue Five does not simply strain the language of the Wright Amendment, it breaks that statute. By

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[8] Southwest took no position before the DOT or in the Fifth Circuit on Issues Three (56 seat non-stop service) and Four (use agreements). Accordingly, Southwest takes no position here on the DFW Airport Board's request that the Court grant a writ to consider Question No. 1, as stated in the Cross Petition, which concerns DOT Issue Four.

affirming the DOT's negation of the express will of Congress as set out in that statute, the Fifth Circuit has both violated this Court's clear direction in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), on the obligation of a court to honor the express intent of Congress; and brought itself into conflict with the D.C. Circuit's application of the Wright Amendment in *Continental Air Lines, Inc. v. Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988). This Court should act to correct both that violation of its direction and the consequent conflict between the Circuits.

REASONS FOR GRANTING THE PETITION

The Court should grant review because the Fifth Circuit's interpretation of the Wright Amendment with respect to single-ticket service violates the teaching of the Court in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.* and creates a conflict with a decision of the D.C. Circuit.

Because the Department of Transportation has responsibility for the administration of the Wright Amendment,[9] the rules established by this Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,

[9] *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994) at 371 (It is well established that the DOT "has regulatory authority to enforce the federal aviation laws."); *Cramer v. Skinner*, 931 F.2d 1020, 1024 (5th Cir. 1991) (explaining that the DOT enforces the Love Field (or Wright) Amendment); *Continental Air Lines, Inc., v. Dep't of Transp.*, 843 F.2d 1444, 1449 (D.C. Cir. 1988) (applying *Chevron* analysis to DOT Order interpreting Love Field amendment).

467 U.S. 837 (1984), should have governed the Fifth Circuit's review of the DOT's interpretation of that statute. In *Chevron*, this Court instructed that:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43 (footnotes omitted).

Under *Chevron's* first step, a court must apply the "traditional tools of statutory construction" to determine if the statute in question is ambiguous. 467 U.S. at 843, n.9. Accordingly, the court may consider "both the plain language and meaning of the statute and any pertinent legislative history." *Ghiglieri v. Sun World Nat. Ass'n*, 117 F.3d 309, 313 (5th Cir. 1997), *cert. denied*, 523 U.S. 1046 (1998). "It is only when traditional methods of statutory construction fail to reveal a provision's meaning that [courts] conclude that [the statute] is ambiguous." *United Services Auto. Ass'n. v. Perry*, 102 F.3d 144, 147 (5th Cir. 1996). Because the Wright Amendment is clear on the issue presented here, the limitations on single-ticketing from Love Field, the Fifth Circuit's review should have been governed by Step I of *Chevron*. Accordingly, the

court of appeals should have applied the unambiguous words of the statute. It did not follow that rule, and in so doing it both violated the intent of Congress and created conflict with another Circuit – two results which justify the attention of this Court.

A. The DOT's Ruling on Issue Five, Affirmed by the Fifth Circuit, Violates the Plain Meaning of the Wright Amendment.

1. The Language of the Statute

With respect to the precise issue at hand, the Wright Amendment is unambiguous. An air carrier may not advertise and sell through service from Love Field to a destination outside the eight-state Love Field service area, at least when using large aircraft (having more than 56 seats) to fly beyond those eight states.

While the Department framed this issue – Number Five on its list – in broad and generic terms when it instituted the *Love Field Service Interpretation Proceeding* (FW Pet.App. 81), it expressed its final ruling on Issue Five entirely in the context of the service actually being provided to Love Field passengers by Continental Airlines and its subsidiary Continental Express (FW Pet.App. 141-46), and it was this specific ruling which the Fifth Circuit affirmed. 202 F.3d at 812, n.23 (FW Pet. App. 48). Accordingly, to understand the DOT's ruling and the Fifth Circuit's affirmance, it is crucial to understand precisely what service Continental and Continental Express are holding out to Love Field passengers.

Continental Express began serving Love Field in June 1998, flying between Love Field and Houston's George Bush Intercontinental Airport with 50-seat "regional jets,"

new generation aircraft which, though smaller than conventional commercial jet aircraft, fly at speeds and altitudes comparable to many large jets. Even before Continental Express commenced its Love Field-Houston regional jet service, it began advertising and selling service it described as "Love Field to the World." 202 F.3d at 812. The advertisements proclaimed that "More than 190 Destinations in 38 Countries" are now "Available at Love Field." That service continues today.

Under this scheme, Continental Express transports Love Field passengers to Houston on its 50-seat aircraft, then transfers them to flights operated by Continental Airlines on large aircraft (*i.e.*, conventional jets with more than 56 seats) from Houston to numerous points around the nation and the world. Love Field passengers transported by Continental on this service receive a single ticket with a single sum fare, and are routed to their final destination without having to reclaim and recheck their luggage. In this manner, Continental Airlines is providing through service and ticketing of passengers between Love Field and points beyond the Love Field service area. Declaratory Order 98-12-27 (FW Pet.App. 141-42); *American Airlines, Inc. v. Department of Transportation*, 202 F.3d at 812 (FW Pet App. 47-48).

Viewed against the plain language of the Wright Amendment, Continental's "Love Field to the World" service unquestionably violates the statute. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed." *Caminetti v. United States*, 242 U.S. 470, 495 (1917). Subsection (c) of the Wright Amendment, as amended by the Shelby Amendment, authorizes air carriers to provide service between Love Field and points in

the eight-state Love Field service area, subject to two restrictions. The second of these restrictions is that

> (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State.

Wright Amendment subsection (c). Because Continental is offering for sale transportation from Love Field to, and its flight and aircraft serve, points outside the eight-state region, Continental is doing precisely what the statute prohibits.

The DOT attempted to escape the plain language of the beyond-area restriction in subsection (c)(2) by resorting to language in subsection (a) of the Wright Amendment. That subsection *prohibits* the federal government from authorizing:

> transportation of individuals, by air, as a common carrier . . . *between Love Field, Texas and one or more points outside the State of Texas,* except . . . *(2)* air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.

Wright Amendment subsection (a) (emphasis added). The Department claims that, because Continental Express flies between Love Field and Houston with aircraft having less than 56 seats, the "commuter exception" of subsection (a) (2) exempts the *entire* through service and ticketing offered by Continental Express and Continental Airlines between Love Field and "the World" from the prohibition in subsection (c) (2) against providing service to points outside the Love Field service area. FW Pet.App. 142-43 (Order 98-12-27).

The DOT's analysis, which the court of appeals characterized as "strained," but which it nevertheless

affirmed,[10] suffers from two critical defects, in light of the plain language of the statute. First, Continental Express is not providing "transportation of individuals, by air, between Love Field, Texas and one or more points *outside the State of Texas* . . . ," as subsection (a) (2) requires. Continental Express is instead transporting Love Field passengers only to Houston, a point *within* Texas. Thus, whatever the reach of the "commuter exception" in subsection (a) may be, Continental Express does not qualify for it, as it is providing only intrastate, not interstate service at Love Field. Subsection (a) is simply inapplicable to Continental Express' Dallas-Houston service and therefore cannot shield its "Love Field to the World" flights from the clear prohibition against beyond-area service in subsection (c) (2).[11]

Moreover, even if Continental Express were operating small-aircraft flights to a point outside Texas, the commuter exception of subsection (a) would not immunize Continental's through service and ticketing to points beyond the Love Field service area from the prohibition in subsection (c). Subsection (a) and subsection (c) must be read *together*, not as independent statutes with no relationship to one another. As this Court has instructed, "[s]tatutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often

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[10] 202 F.3d at 813 (FW Pet. App. 51).

[11] In its decision, the Fifth Circuit stated that "[t]he substance of DOT's ruling . . . is geared towards the specific service offered by Continental Express and therefore considered solely whether the Love Field amendments permit an airline to offer through service through a point *within Texas*. We limit the scope of our review to the narrower question actually resolved by DOT." 202 F.3d at 812, n.23 (FW Pet. App. 48).

clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

The first sentence of subsection (a) reads: "*[e]xcept as provided in subsection* (c)." The plain meaning of this language is that the prohibition on interstate flights (and with it, the exception for commuter aircraft) *does not apply* to the circumstances set forth in subsection (c). The language in subsection (c) reinforces this interpretation:

> *[s]ubsections (a) and (b) shall not apply* with respect to, and it is found consistent with the public convenience and necessity to authorize transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if . . . (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State.

Subsection (c) (emphasis added). The statute is clear that interstate service is permitted from Love Field to points within the five (now eight) state service area, but not beyond. This prohibition in subsection (c) applies to a flight and aircraft of an air carrier – not a flight that uses only large aircraft *all the way from Love Field to its final destination*.

The Department's reading of the statute creates ambiguity where there is none. *Cf. City of Dallas v. FCC*, 165 F.3d 341, 353 (5th Cir. 1999). ("Because we believe the Commission has ignored plain text and has attempted to manufacture an ambiguity in order to obtain an increased

level of judicial deference, we invalidate the rule . . . "). By treating subsection (a) as an independent statutory provision that is unaffected by the prohibition in subsection (c) against beyond-area service, the Department fails to examine "the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

The Department's reading of subsection (c) – applying it only to flights using large aircraft[12] – does not save the Department's ultimate conclusion on the through ticketing issue. For the Department simply cannot escape the fact that *Continental is using large aircraft to transport Love Field passengers beyond the eight-state service area by means of through service and ticketing*. This service is contrary to the plain language of subsection (c) (2) of the Wright Amendment barring airlines serving Love Field from offering "transportation to or from . . . any point which is outside" the prescribed Love Field service area.

Even the DOT concedes that subsection (c) applies (at least) to operations with large aircraft. Thus, Continental's through service (on large aircraft) to transport Love Field passengers outside the service area is prohibited. The fact that it used small aircraft on an earlier leg of the journey within the service area is irrelevant. Both portions of the flight would be independently lawful; however, when held out as through service between Love Field and points outside the service area, on a single ticket and with no requirement to reclaim baggage, the service plainly violates subsection (c).

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[12] For example, the DOT describes subsection (c) as the subsection governing flights with large aircraft." FW Pet. App. 142 (Order 98-12-27).

This concern by Congress for the careful control of single-ticketing in the context of its detailed regulation of Love Field flights should not be surprising; for it is a significant matter. Indeed, the DOT never acknowledges the practical consequences of its ruling in the marketplace. The Department has, in effect, created an exception that swallows the rule against holding out air service between Love Field and points beyond the eight-state service area. DOT's ruling confers upon Continental Airlines the very substantial competitive advantage of advertising and selling flights from Love Field to, for example, Baltimore, Cleveland, London, and a multitude of other destinations around the nation and the world which Southwest cannot legally serve from Love Field because it uses only large aircraft.

The DOT's ruling has produced two sets of operating rules for two air carriers using the same type of aircraft to transport the same passengers between the same points. The Department never explains how two such arbitrarily different and discriminatory operating regimes can fairly be attributed to the wishes of Congress. While the Department glibly asserts that any such discrimination "stems from Southwest's own decisions" to use large aircraft, Order 98-12-27 (FW Pet. App. 145), it simply overlooks the fact that Continental, in competition with Southwest, is itself using large aircraft to transport Love Field passengers to points outside the eight Love Field states. This failure to recognize these practical realities, which were obviously of real importance to Congress, only confirms the failure of the DOT and the Fifth Circuit to carry out the express will of Congress on the single-ticketing issue.

2. The Legislative History

Chevron directs the courts to use "traditional tools of statutory construction," 467 U.S. at 843, n.9, in reviewing agency interpretations. The first method of construction, of course, is to read the statute. Where, as here, the language is clear, nothing further is necessary. However, if resort is made to the second tool of statutory construction, legislative history, that also leads to the conclusion that the DOT and the court of appeals have not simply strained the congressional scheme, they have violated it.

The legislative history in the present case is clear and compelling: Congress intended to prohibit any air carrier from transporting Love Field passengers to points outside the Love Field service area on large aircraft. There is nothing in the legislative history remotely suggesting that Congress intended to exempt from that prohibition an air carrier using small aircraft to fly to a point in Texas, then connecting with large aircraft to transport passengers outside of Texas and the other seven states in the Love Field service area, by means of through service and ticketing.

As discussed earlier, the original version of the legislation that became the Wright Amendment was introduced by Majority Leader Jim Wright of Fort Worth, in response to the CAB's *Automatic Market Entry* decision authorizing Southwest Airlines "to inaugurate a new series of interstate flights at the abandoned Love Field." 125 Cong. Rec. H10577 (Nov. 13, 1979) (statement of Rep. Wright). Rep. Wright made no secret of his objective. Noting that "the cities of Fort Worth and Dallas jointly had committed $600 million of their taxpayers' money to the building of a new, modern, and safe facility midway

between those two cities," he sought to eliminate competition with the new DFW Airport by barring *all* interstate air service at Love Field. Id. While the conference compromise legislation was less restrictive, in allowing limited interstate service, its objective remained the same – to limit Love Field's competitive impact on the newly constructed DFW airport. *See Kansas v. United States*, 16 F.3d 436, 438 (D.C. Cir. 1994) ("Congress passed the Wright Amendment to limit the competitive impact of Love Field.").

The legislation achieved this goal by severely limiting the reach of interstate flights that could be operated at Love Field. By restricting Love Field's interstate flights to short-haul service to the four contiguous states, Congress ensured that Love Field services would not present a viable competitive threat to the new DFW Airport, where interstate service would be completely unrestricted.

The DOT itself reached the same conclusion in 1985, the last time it had occasion to review the restrictions on Love Field air service:

> The legislative history supports our view that Congress intended to make Love Field a short-haul airport limited to turnaround intrastate and interstate service in five states.
>
> * * *
>
> Congress intended to prohibit carriers from providing through service and ticketing beyond the authorized Love Field service area.

DFW Pet. App. 11,14 (Order 85-12-81). The D.C. Circuit, in reviewing the DOT's 1985 Order, agreed. *See Continental Air Lines, Inc. v. DOT*, 843 F.2d 1444, 1447 (D.C. Cir. 1988) ("Congress' intent in crafting the Love Field

Amendment was solely to limit that airport to 'short-haul' service.").

Continental Airlines' through service and ticketing of Love Field passengers to "More than 190 Destinations in 38 Countries" is hardly "short-haul." Yet, the Department's order does not squarely address the glaring conflict between its ruling on this point and the intent of Congress, repeatedly recognized by the courts (and by the DOT itself in 1985), to limit Love Field's interstate flights to a strictly confined service area. The Fifth Circuit, in its effort to defer to the "DOT's expertise" and avoid substituting its own apparently contrary opinion on this issue, 202 F.3d at 813 (FW Pet. App. 52), overlooked the first rule of *Chevron* – that both agencies and courts must defer to the will of Congress in interpreting and applying legislation. 467 U.S. at 842-43. That violation of the direction of this Court and the consequent failure to apply the law as written by Congress to the operation of aviation in North Texas is the reason to grant review here.

B. The Conflict with the D.C. Circuit

The DOT has failed entirely to reconcile its present view of the statute with the opposite position, which it took in the *Love Field Amendment Proceeding, supra,* when it addressed the application of the Wright Amendment to air carriers offering both intrastate and interstate service on the same flight. Then, the Department concluded as follows:

> The CAB . . . decided that *carriers could not evade the Amendment's restrictions by providing flights, for example, between Love Field and Houston and then continuing the flights between Houston and*

> *points outside the five-state area*. The Department believes the CAB was substantially correct.
>
> * * *
>
> . . . the carrier cannot offer, promote, or sell through service and fares or tickets between Love Field and points outside the authorized service area using another Texas city as the connecting point.

DFW Airport Board Pet.App. 19-20 (Order 85-12-81). This position was affirmed by the United States Court of Appeals for the District of Columbia Circuit in its decision in *Continental Air Lines v. Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988). The D.C. Circuit held that the " . . . DOT's interpretation is consistent with the purpose of the Amendment to limit Love Field to short haul services." 843 F.2d at 1454-55. As the DFW Airport Board has noted at length in its Cross-Petition, at 20-28, the Fifth Circuit's affirmance of the through ticketing provision of the DOT's 1998 Order creates a conflict with the D.C. Circuit's affirmance of the contradictory 1985 Order.

The DOT and the court of appeals both brush off this contradiction in footnotes, arguing that the earlier Order referred only to Love Field flights operated with large aircraft subject to the restrictions of subsection (c). FW Pet.App. 143, n.30 (Order 98-12-27); *American Airlines, Inc. v. DOT*, 202 F.3d at 813, n.24 (FW Pet. App. 50-51). These statements overlook the fact that Continental's connecting flights at Houston transporting Love Field passengers outside the service area are also *"operated with large aircraft subject to the restrictions of subsection* (c)," via through service and ticketing. The DOT has failed to provide a principled distinction between its present position on this point and its contrary 1985 position. Nothing

in the Wright Amendment's legislative history indicates that an airline can evade the beyond-area service restriction simply by using a small aircraft on the first leg of the journey. To the contrary, the Conference Report states:

> *The Act*, however, imposes certain conditions on *any airline* certificated to operate interstate Love Field service. . . . Such Love Field *carriers* may not hold out, offer or advertise Love Field service to or from points beyond the four contiguous States in any respect . . .
>
> Thus, *a carrier providing service from Love Field to a point in one of these States* is not forbidden from providing service from that point to other points in other States beyond, but it could not do so on a continuation of the same flight to or from Love Field, or on the same aircraft coming from or going to Love Field, and *it could not advertise or promote its service to points in States beyond.*

H.R. Conf Rep. No. 96-716, at 25-26 (1979) (emphasis added).

Congress' intent could not have been more clear. The conditions specified in subsection (c) are requirements for all service described in "the Act"; those conditions apply to "any airline" providing Love Field service; and, "a carrier providing service from Love Field to a point in one of these States" [in the service area] "could not advertise or promote its service to points in States beyond."

DOT's only response to this overwhelming evidence of Congress' intent to limit Love Field to short-haul service is the assertion that "the Shelby Amendment demonstrates that Congress is less interested in limiting Love Field to short-haul service, when the Love Field flight is operated with aircraft with a passenger capacity of 56 passengers or less." FW Pet.App. 144-45 (Order 98-12-27).

Yet, there is nothing in the language of the Shelby Amendment, nor in its legislative history, to support the Department's sweeping conclusion. Subsection (a) of the Shelby Amendment clarifies the definition of commuter aircraft to include "aircraft . . . reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56." Subsection (b) of the Shelby Amendment simply amends subsection (c) of the Wright Amendment to add Kansas, Alabama and Mississippi to the five states within which interstate service is permitted at Love Field. Aside from these specific, narrow provisions, there is nothing at all in the language of the Shelby Amendment indicating that "Congress is less interested in limiting Love Field to short-haul service . . . "

The Shelby Amendment's sparse legislative history is even more unavailing to DOT. The only mention of the Amendment in the Conference Committee Report states: "The conferees have included the provision recommended by the Senate *clarifying the meaning* of Section 29(a)(2) of the International Air Transportation Competition Act of 1979 regarding air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less." H.R. Conf. Rep. No. 105-313, at 45 (1997) (emphasis added).

At most, the Shelby Amendment can be read to allow aircraft reconfigured to hold 56 seats to be used under the "commuter exception," subsection (a) (2) of the Wright Amendment; and to expand the Love Field service area under subsection (c) from five to eight states. This is a far cry from DOT's position, that the Shelby Amendment expanded the Love Field service area to include "190

Destinations in 38 Countries" so long as an aircraft of 56 seats or less is used on the first leg of the journey.

In short, the Department's interpretation of the Wright Amendment, as affirmed by the Fifth Circuit, conflicts with the plain language of the statute and the intent of Congress to limit Love Field to short-haul air service, and to prohibit through service and ticketing of Love Field passengers to points outside the Love Field service area on large jets.

CONCLUSION

Congress has chosen to regulate precisely the distribution of airline business in North Texas between DFW Airport and Love Field. For over a decade following the 1985 DOT Order and the D.C. Circuit decision affirming it, the through ticketing issue had been understood. Now, entirely unrelated to the Shelby Amendment, the DOT and the Fifth Circuit have changed the rules on that issue, creating conflict with both the will of Congress and the prior decisions. Those conflicts are the proper business of this Court to resolve.

For the foregoing reasons, the writ of certiorari should be granted on Cross-Petitioner's Question No. 2 concerning the Wright Amendment's prohibition against through service and ticketing of Love Field passengers to points beyond the Love Field service area.

Respectfully submitted,

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STATUTORY PROVISIONS

The Wright Amendment. Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35, 48 (1980), provides:

> Sec. 29 (a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, except (1) charter air transportation not to exceed ten flights per months, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.
>
> (b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.
>
> (c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize,

> transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

The Shelby Amendment. Sections 337(a) and (b) of the Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997) provide:

> SEC. 337(a) IN GENERAL. – For purposes of the exception set forth in section 29(a)(2) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48), the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.
>
> (b) INCLUSION OF CERTAIN STATES IN EXEMPTION. – The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94

Stat. 48 et seq.) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas."